



DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS-2016-0091]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security

DHS/U.S. Customs and Border Protection (CBP)-023 Border Patrol Enforcement

Records (BPER) System of Records

AGENCY: Department of Homeland Security, Privacy Office.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security is issuing a final rule to amend its regulations to exempt portions of a newly established system of records titled,

“Department of Homeland Security U.S. Customs and Border Protection (DHS/CBP)-

023 Border Patrol Enforcement Records (BPER) System of Records” from certain

provisions of the Privacy Act. Specifically, the Department exempts portions of the

“DHS/CBP-023 BPER System of Records” from one or more provisions of the Privacy

Act because of criminal, civil, and administrative enforcement requirements.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For general questions, please contact:

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SUPPLEMENTARY INFORMATION:

I. Background:

The Department of Homeland Security (DHS) U.S. Customs and Border Protection (CBP) published a notice of proposed rulemaking in the Federal Register, (81 FR 72551, October 20, 2016) proposing to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. DHS issued the “DHS/CBP-023 Border Patrol Enforcement (BPER) Records System of Records” in the Federal Register at 81 FR 72601 on October 20, 2016, to provide notice to the public that DHS/CBP will collect and maintain enforcement records to secure the U.S. border between Ports of Entry (POE), furthering its enforcement and immigration mission. DHS previously maintained these records under the DHS/ICE-011 Criminal Arrest Records and Immigration Enforcement Records (CARIER) (81 FR 72080, October 19, 2016) and the DHS/USVISIT-004 DHS Automated Biometric Identification System (IDENT) (72 FR 31080, June 5, 2007) System of Records Notices. DHS/CBP issued this new system of records to claim ownership of records created as a result of CBP interactions between POE.

DHS/CBP invited comments on both the Notice of Proposed Rulemaking (NPRM) and System of Records Notice (SORN).

II. Public Comments:

DHS/CBP received one positive comment on the NPRM and no comments on the SORN for the DHS/CBP-023 BPER System of Records. After consideration of the public comment, DHS will implement the rulemaking as proposed.

List of Subjects in 6 CFR Part 5

Freedom of information, Privacy.

For the reasons stated in the preamble, DHS amends Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5--DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 continues to read as follows:

Authority: Pub. L. 107-296, 116 Stat. 2135; (6 U.S.C. 101 et seq.); 5 U.S.C. 301.

Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add paragraph 76 to appendix C to part 5 to read as follows::

Appendix C to Part 5 – DHS Systems of Records Exempt From the Privacy Act

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76. The DHS/CBP-023 Border Patrol Enforcement Records (BPER) System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS/CBP-023 BPER System of Records is a repository of information held by DHS/CBP in connection with its several and varied missions and functions, including, but not limited to the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; and national security and intelligence activities. The DHS/CBP-023 BPER System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other federal, state, local, tribal, foreign, or international government agencies. The Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(j)(2), has exempted this system from the following provisions

of the Privacy Act: 5 U.S.C. 552a (c)(3), (c)(4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5), (e)(8); and (g). Additionally, the Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(k)(2), has exempted this system from the following provisions of the Privacy Act: 5 U.S.C. 552a (c)(3); (d); (e)(1), (e)(4)(G), and (e)(4)(H). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

- (a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.
- (b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with

ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

- (c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.
- (d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.
- (e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.
- (f) From subsections (e)(4)(G) and (e)(4)(H) (Agency Requirements) because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing

notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with subsection (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

Dated: December 13, 2016.

Jonathan R. Cantor,
Acting Chief Privacy Officer,
Department of Homeland Security.

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